NO. 91-5961

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TERRY LYNN STINSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether possession of a firearm by a felon is a "crime of violence," as that term is used in the Career Offender provisions of the Federal Sentencing Guidelines, §§4B1.1 and 4B1.2?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, **TERRY LYNN STINSON**, respectfully prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on March 20, 1992 and October 4, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit denying the petition for rehearing is reported at 957 F.2d 813, and the opinion of the Court of Appeals for the Eleventh Circuit affirming petitioner's sentence is reported at 943 F.2d 1268. Both opinions are set forth in the appendix hereto.

JURISDICTION

The petitioner, **TERRY LYNN STINSON**, was prosecuted by indictment in the United States District Court, for the Middle District of Florida, for violation of Title 18 U.S.C. §2113(a) and (d), Title 18 U.S.C. §922(g), §924(a)(2) and §924(e), Title 18 U.S.C. §924(c), Title 26 U.S.C. §5861(d) and §5871, and Title 18 U.S.C. §2312. Stinson pled guilty to all charges and was sentenced on July 6, 1990.

Stinson appealed his sentence to the Eleventh Circuit Court of Appeals invoking the Court's jurisdiction under Title 18 U.S.C. §3742(a)(2) and (3) as well as Title 28 U.S.C. §1291. Stinson's sentence was affirmed by the Eleventh Circuit Court of Appeals in an opinion rendered on October 4, 1991. Stinson's petition for rehearing was denied in an opinion entered on March 20, 1992.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit Court of Appeals is invoked under Title 28 U.S.C. §1254(1).

SENTENCING GUIDELINE PROVISION INVOLVED

§4B1.1. **Career Offender**

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise

applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum		Offense Level*
(A)	Life	37
(B)	25 years or more	34
(C)	20 years or more, but less than 25 years	32
(D)	15 years or more, but less than 20 years	29
(E)	10 years or more, but less than 15 years	24
(F)	5 years or more, but less than 10 years	17
(G)	More than 1 year, but less than 5 years	12

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by 2 levels.

STATEMENT OF THE CASE

(A) **Course of Proceedings and Dispositions in the Courts Below.**

On January 10, 1990, a five count indictment was filed by a Middle District of Florida Grand Jury charging Terry Lynn Stinson, the Petitioner herein, with armed bank robbery, various firearm violations, including, possession of a firearm by a felon (subject to the armed career criminal provision), and interstate transportation of a stolen motor vehicle. Count One charged Mr. Stinson with bank robbery on October 31, 1989, at Jacksonville, Florida, in violation of Title 18 U.S.C. §2113(a) and (d). Count Two charged that on October 31, 1989, having been previously convicted of a felony offense, Mr. Stinson possessed a firearm, in violation of Title 18 U.S.C. §922(g), §924(a)(2), and §924(e) (Armed Career Criminal Act). Count Three charged that on October 31, 1989, Mr. Stinson did knowingly use and carry a sawed-off shotgun during, and in relation to, a crime of violence, that is, bank robbery, in violation of Title 18 U.S.C. §924(c). Count Four charged that on October 31, 1989, Mr. Stinson possessed a sawed-off shotgun which was not registered to him in the National Firearms Registration and Transfer Record, in violation of Title 26 U.S.C. §5861(d), and §5871. Count Five charged that on or about October 31, 1989, to on or about November 3, 1989, Mr. Stinson transported in interstate commerce, a stolen 1985 Ford van from Jacksonville, Florida,

to Gulfport, Mississippi, in violation of Title 18 U.S.C. §2312. The Federal Public Defender for the Middle District of Florida was appointed to represent Mr. Stinson on January 29, 1990 and William Mallory Kent, Assistant Federal Public Defender filed an appearance on behalf of Mr. Stinson.

On April 11, 1990, Mr. Stinson entered a plea of guilty to Counts One through Five. Mr. Stinson was sentenced by the Honorable Susan H. Black, then Chief Judge of the Middle District of Florida, on July 6, 1990 to 365 months imprisonment as to Counts 1, 2, 4 and 5 and to five (5) years as to Count 3, to run consecutive to the sentence on Counts 1, 2, 4 and 5.[1]

A notice of appeal was timely filed on July 13, 1990, whereupon an appeal to the Eleventh Circuit followed. In an opinion authored by Circuit Judge Edmondson, for a three judge panel, Mr. Stinson's sentence was affirmed on October 4, 1991. Mr. Stinson's petition for rehearing was denied in a per curiam opinion on March 20, 1992 and his petition for rehearing en banc was denied by memorandum order thereafter. This petition followed in a timely fashion.

(B) **Statement of Facts**

On October 31, 1989, at approximately 12:00 p.m., the Petitioner, Terry Lynn Stinson, entered Sun Bank located at

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[1]Judge Black's nomination to the Court of Appeals for the Eleventh Circuit was approved by the United States Senate the week of the filing of this petition.

344 Monument Road, Jacksonville, Florida and approached one of the customer service employees. He demanded money from the bank employee and stated that if she did not comply he would throw what appeared to be a hand grenade in her lap. The customer service employee then escorted him to one of the teller windows where she instructed the teller to give him the money. The teller took the money out of the cash drawer and placed it on the counter. Mr. Stinson then handed the employee a plastic bag and told her to put the money in it. During the confrontation, Mr. Stinson displayed a sawed-off shotgun and also pointed it at the customer service representative's face.

Mr. Stinson stated to the employees that he did not want any dye packs or bait money and also stated that he wanted the money from the drive through cash drawers. A dye pack was placed in Mr. Stinson's bag, but it failed to activate.

After obtaining the money, Mr. Stinson ordered everyone in the bank to lie down. As he was leaving the bank, he threw the hand grenade that he had in his hand onto the floor. He fled the bank, traveling in a white Chevrolet pick-up truck. A total of $9,427.00 in United States currency was taken in the robbery.

Subsequent investigation determined that the hand grenade used by Mr. Stinson was not armed. During the robbery, Mr. Stinson had in his possession a portable, hand held police scanner. Mr. Stinson's get-away vehicle was located by the

police at 355 Monument Road in the Regency Lake Apartment Complex. Located in the back of the truck was an explosive device, constructed from PVC pipe, concrete, stereo speaker wires and other components. The area was evacuated and the Navy Explosive Ordinance Demolition Team was called to the scene and subsequently rendered the device harmless. The sawed-off section of the barrel of the shotgun used by Mr. Stinson in the bank robbery was also found in the back of the truck.

Subsequent to the bank robbery, it was reported to the Jacksonville Sheriff's Office that Mr. Stinson had accompanied a car salesman for Mike Davidson Ford on a test drive of a 1985 Ford van. During the test drive, Mr. Stinson took the car salesman, by gun point, to Woodcreek Apartments, 401 Monument Road, where Mr. Stinson resided. While in the apartment, Mr. Stinson restrained the car salesman with a pair of handcuffs and rope. Additionally, he told the salesman, Mr. Dorminey, that he had rigged a bomb in the apartment, which would go off if Mr. Dorminey left the closet where he was confined. Mr. Stinson then left his apartment driving the white pick-up truck and proceeded to Sun Bank where the robbery was committed. After the robbery, the defendant then returned for the Ford van, leaving the pick-up truck behind.

It was later reported by the car salesman that Mr. Stinson displayed a Florida identification at the car dealership, which reflected his true identity.

After the robbery, Mr. Stinson left Jacksonville, Florida traveling in the stolen Ford van. He traveled to Walt Disney World, in Orlando, Florida for a brief vacation on the day of the robbery. The following day, he traveled to Gulfport, Mississippi, where he was arrested on November 3, 1989. The Chevrolet pick-up truck which was used during the bank robbery was stolen from Cox Pools, Tallahassee, Florida, Mr. Stinson's former employer. The vehicle was reported stolen on October 6, 1989.

The Pre-Sentence Investigation Report determined that Mr. Stinson was a career offender pursuant to Sentencing Guidelines §4B1.1, choosing among his five counts of conviction as the "instant offense conviction" the charge of possession of a firearm by a convicted felon, the penalty for which was enhanced under the armed career criminal provisions of Title 18 U.S.C. §924(e) to life in prison, concluding that the charge of possession of a firearm by a felon was a crime of violence. Based on the career offender provision, with the predicate offense having a maximum penalty of life in prison, the base offense level was 37 and criminal history category was VI, with a guideline range of 360 months to life in prison.

At the sentencing hearing, counsel for Mr. Stinson repeated the objection previously made to the United States Probation Office that possession of a firearm by a felon, if the offense was committed prior to November 1, 1989, was not

a "crime of violence" under Guideline Section 4B1.1 [which defines the term by incorporating the definition of "crime of violence" under Title 18, U.S.C. §16], and cannot be the predicate offense to trigger the career offender provisions of Guideline Section 4B1.1.

The District Court ruled against Mr. Stinson as to his of objection. The District Court then determined the base offense level to be 37, reduced that level two levels for "acceptance of responsibility" for a total offense level of 35, category VI, and a sentencing range of 292-365 months. The District Court sentenced Mr. Stinson to 365 months, plus a minimum mandatory consecutive five (5) years for use of a firearm during the commission of a crime of violence (Title 18 U.S.C. §924(c)). That sentence was affirmed by the Eleventh Circuit on October 4, 1991.

Subsequent to the issuance of the first Stinson opinion on October 4, 1991, the United States Sentencing Commission issued an amendment to the Commentary to Sentencing Guideline §4B1.2, specifically addressing the sole issue in this petition. That amendment, which became effective on November 1, 1991, clarified the pre-existing intent of the Sentencing Commission that the term "crime of violence" (as used in the career offender provision §4B1.1) does not include the offense of unlawful possession of a firearm by a felon. This clarifying amendment was the basis for a petition for rehearing and rehearing en banc. The Eleventh Circuit denied

the petition for rehearing in an opinion issued on March 20, 1992. Thereafter, the petition for rehearing en banc was denied, and this petition followed.

REASONS FOR GRANTING THE WRIT

Section 4B1.1 of the Sentencing Guidelines provides:

> "A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense"

Stinson does not contest element (1), that he was over eighteen at the time of the offense, or (3), that he had been twice convicted of crimes of violence. Stinson argues that the offense used in his case as the predicate "instant offense of conviction," was not a "crime of violence." Stinson's conviction for possession of a firearm by a felon was chosen by the sentencing court as the predicate instant offense, holding over Stinson's objection, that possession of a firearm by a felon is a "crime of violence," as that term is defined in Section 4B1.2 of the Sentencing Guidelines.[2]

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[2]Because Stinson had three prior violent felonies, he was subject to a minimum mandatory fifteen years to life imprisonment for conviction on the possession of a firearm charge, under Title 18, §924(e)(Armed Career Criminal Act). Stinson agreed that he was a career offender, but only by using his armed bank robbery conviction (Title 18, §2113(a)(d)) as the predicate instant offense. The maximum penalty for armed bank robbery is twenty-five years. Under the career offender provision of the guidelines, the maximum penalty for the predicate instant offense determines the total offense level. The total offense level is thirty-seven for a life offense, but only thirty-four for an offense punishable by twenty-five years. What is ultimately at issue in Stinson's case is that three level difference, which at

Stinson's crime occurred on October 31, 1989 and he was sentenced on July 6, 1990. At the time of his offense §4B1.2 defined "crime of violence" to have the same meaning as the definition of crime of violence in Title 18, §16.

However, §4B1.2 was amended effective November 1, 1989, i.e., before Stinson's July 6, 1990 sentencing, to define crime of violence as follows:

> "(1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that -
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> > (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[3] (emphasis supplied)

Category VI, is a difference in range from 360 months to life at level thirty-seven, to 262 to 327 at level thirty-four. Because Stinson received a two level downward adjustment for acceptance of responsibility, to level thirty-five, the difference in ranges is 292 to 365 for level thirty-five and 210 to 262 for level thirty-two.

[3]The definition applicable at the time of the offense (October 31, 1989) was that found at Title 18, §16, which reads:

> **§ 16. Crime of violence defined**
>
> The term "crime of violence" means-
>
> > (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> >
> > (b) any other offense that is a felony and that, by its nature, involves a substantial risk

The amended definition was apparently borrowed from the definition of crime of violence used in the Armed Career Criminal Act, Title 18, §924(e). In the Application Notes in the Commentary to §4B1.2 effective November 1, 1989, the Sentencing Commission stated that courts may look to "conduct set forth in the count of which the defendant was convicted," in deciding whether the predicate instant offense "presented a serious potential risk of physical injury to another." (U.S.S.G. §4B1.2, comment. (n.2)). A later amendment effective November 1, 1991, clarified what "conduct" was the focus of the inquiry, by adding "the conduct set forth (i.e. expressly charged) in the count of which the defendant was convicted."

Relying on either the pre-November 1989 Title 18, §16 definition, or the later "borrowed" §924(e) definition of crime of violence, the Third, Seventh, Eighth, and Tenth circuits held that on the facts of the respective cases (impliedly, or expressly stating that the offense was not per se or categorically a crime of violence), that possession of a firearm by a felon was a crime of violence for career offender purposes. **United States v. Williams**, 892 F.2d 296

> that physical force against the person or property of another may be used in the course of committing the offense.

The Ex Post Facto concern raised by the Circuit court's application of the amended definition in effect at the time of sentencing will be addressed below.

(3rd Cir. 1989); **United States v. McNeal**, 900 F.2d 119 (7th Cir. 1990); **United States v. Alvarez**, 914 F.2d 915 (7th Cir. 1990); **United States v. Cornelius**, 931 F.2d 490 (8th Cir. 1991); **United States v. Walker**, 930 F.2d 789 (10th Cir. 1991).[4] In addition, the Fifth, Ninth and Eleventh Circuits each held that possession of a firearm by a felon was per se, or categorically, a crime of violence. **United States v. Goodman**, 914 F.2d 696 (5th Cir. 1990); **United States v. Shano**, 947 F.2d 1263 (5th Cir. 1991) (**Shano I**); **United States v. O'Neal**, 937 F.2d 1369 (9th Cir. 1990); **United States v. Stinson**, 943 F.2d 1268 (11th Cir. 1991) (**Stinson I**).[5]

Following the Eleventh Circuit's opinion in **Stinson I**, and without any advance public notice, the Sentencing Commission issued a clarifying amendment to Application Note 2 to the Commentary to the Career Offender provisions. The note was amended by adding the following language:

> "The term "crime of violence" does not include the offense of unlawful possession of a firearm by a felon. Where the instant offense is the unlawful possession of a firearm by a felon, the specific offense characteristics of §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provide an increase in offense level if the defendant has one or more prior felony convictions for a crime of violence or controlled substance offense..." (emphasis supplied).

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[4]The Seventh Circuit, establishing that possession of a firearm is not categorically a crime of violence also held, in **United States v. Chappel**, 942 F.2d 439 (7th Cir. 1991) that possession was not a crime of violence on the facts presented in that case.

[5]There was a debate within these opinions as to whether only the generic offense, or the offense conduct charged in the indictment or the actual underlying conduct could be examined to determine whether a crime of violence had occurred. The Circuits split on the effect of **Taylor v. United States**, ___ U.S. ___, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) on this sub-issue.

At the same time, but following public notice and submission to Congress, Guideline 2K2.1 was substantially revised to expressly provide an offense level 24 (and, in some cases, level 26) for a felon in possession who had two prior crimes of violence or serious drug offenses, and a Guideline was added (§4B1.4), to cover Armed Career Criminals, making an armed career criminal (a felon in possession with three prior crimes of violence or serious drug offenses), level 34 (or, in some cases, level 33). These amendments to the Guidelines were effective November 1, 1991, but the clarifying amendment to the existing commentary presumably clarified preexisting intent, that is, the intent at the time of Stinson's sentencing.

Based upon the clarification published by the Sentencing Commission that it did not intend a possession of a firearm offense to constitute a crime of violence for career offender purposes, Stinson petitioned for a rehearing and for rehearing en banc.

Stinson's petition for rehearing was denied in **United States v. Stinson**, 957 F.2d 813 (11th Cir. 1992)(**Stinson II**), and his petition for rehearing en banc was subsequently denied by a memorandum order. In **Stinson II**, the Eleventh Circuit

held that it was not bound by the change in Guideline Section 4B1.2's Commentary until Congress amends Guideline Section 4B1.2's language to exclude specifically the possession of a firearm by a felon as a "crime of violence." For Stinson, this meant that the Eleventh Circuit stood by its original interpretation of Section 4B1.2 that possession of a firearm by a felon "inherently constitutes a crime of violence," and Stinson's sentence was affirmed and motion for rehearing denied.[6]

However, every other Circuit that has been called upon to reexamine the issue since the November 1, 1991 clarifying amendment has held contrary to the Eleventh Circuit, that possession of a firearm by a felon is not a crime of violence. **United States v. Doe**, ___ F.2d ___ (1st Cir. 1992); **United States v. Bell**, ___ F.2d ___ (1st Cir. 1992); **United States v. Johnson**, ___ F.2d ___ (4th Cir. 1992); **United States v. Poe**, __ F.2d ____ (4th Cir. 1992); **United States v Fitzhugh**, __ F.2d ___ (5th Cir. 1992); **United States v. Shano**, ___ F.2d ___ (5th Cir. 1992)(**Shano II**); **United States v. Sahakian**, ___ F.2d ___ (9th Cir. 1992).[7]

In **Sahakian**, the Ninth Circuit went from holding possession of a firearm is categorically a crime of violence

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[6]On May 14, 1992, in **United States v. Adkins**, ___ F.2d ___, 1992 U.S. App. Lexis 10421 (11th Cir. 1992), the Eleventh Circuit reaffirmed **Stinson I** and **Stinson II**.

[7]**But see**, **United States v. Alvarez**, ___ F.2d ___ (9th Cir. 1992), in which no issue was made of using a possession charge as a predicate for the career offender.

(in **O'Neal**) to hold instead that it categorically is not a crime of violence. Similarly, the Fifth Circuit, post amendment in **Fitzhugh**, has reversed, apparently, its prior holding in **Goodman**, and, in **Shano II** reversed its prior holding in **Shano I**. The First Circuit, in **Bell** and **Doe**, has now joined with the new position of the Ninth Circuit in **Sahakian**, that possession of a firearm by a felon is categorically never a crime of violence. The Fourth Circuit, in **Johnson**, appears to still leave open the possibility that possession of a firearm by a felon can be a crime of violence, if violence is set forth in the express language of the indictment, although holding that it was not a crime of violence on the facts of the particular case.

Where this leaves the issue is that only the Eleventh Circuit continues to hold, alone among all nine circuits that have considered the issue, in the face of Sentencing Commission commentary expressly and directly contradicting its position, that possession of a firearm by a felon is always and in every case, regardless of the conduct charged in the indictment or the actual underlying conduct, a crime of violence for purposes of the Career Offender provision.[8]

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[8]The Eleventh Circuit had held in **United States v. Cruz**, 805 F.2d 1464 (11th Cir. 1986) and in **United States v. Gonzalez-Lopez**, 911 F.2d 542 (11th Cir. 1986) that the 18 U.S.C. §16 definition had to be determined using a generic or categorical approach without looking at actual conduct. Stinson argued that application of the post October 31, 1989 amendments, to the extent they allowed for examination of actual offense conduct, would violate the Ex Post Facto provision of the Constitution.

The Eleventh Circuit did not discuss this Court's opinion in **Williams v. United States**, ___ U.S. ___, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992), in declining to be bound by Sentencing Guidelines commentary expressly prohibiting the position it took in interpreting Sentencing Guideline Section 4B1.2[9]

As the Eleventh Circuit noted, Guideline §1B1.7 states that "commentary is to be treated as the equivalent of a policy statement." In **Williams**, Justice O'Connor, writing for a seven justice majority, explained as follows:

> "Congress has defined "guidelines" as "the guidelines promulgated by the Commission pursuant to §994(a)." 28 U.S.C. §998(c). Section 994(a) grants the Commission the authority to promulgate both "guidelines," 28 U.S.C. §994(a)(1), and "general policy statements regarding application of the guidelines," §994(a)(2). The dissent draws a distinction between the "actual" guidelines and the policy statements that "interpret []" and "explain []" them; in the dissent's view, only the former can be incorrectly applied within the meaning of §3742(f)(1). Post, at 5-6. But to say that guidelines are distinct from policy statements is not to say that their meaning is unaffected by policy statements. Where, as here, a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable guideline. An error in interpreting such a policy statement could lead to an incorrect determination that a departure was appropriate. In that event, the resulting sentence would be one that was "imposed as a result of an incorrect application of the sentencing guidelines" within the meaning of § 3742(f)(1)."

Applied to Stinson's case, the **Williams** approach to interpreting policy statements (and commentary) would appear to mandate a reversal of **Stinson II**, because in **Stinson II** the Eleventh Circuit has chosen to disregard a direct and express prohibition of the Sentencing Commission specifically excluding felons in possession from the definition of crimes of violence.[10]

Additionally, the Eleventh Circuit, in focusing on the one sentence amendment to note two to the Commentary to Guideline §4B1.2 (wherein it was expressly added that the crime of possession of a firearm by a felon was not a crime of violence), ignored the newly added cross-reference to the newly amended Guideline 2K2.1, and also ignored the addition effective November 1, 1990 of new Guideline Section 4B1.4 (Armed Career Criminal).

Before November 1, 1990, there was no guideline for an armed career criminal. Armed career criminals were sentenced outside the guidelines under the statutory mandate of a sentence of "not less than fifteen years." Title 18, §924(e). In counsel's experience, armed career criminals were not

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[9]The **Williams** opinion was issued after Stinson's petition for rehearing was filed and after the United States filed its response, but before the court issued it's opinion denying the petition for rehearing in **Stinson II**. Counsel for Stinson cited **Williams** to the Eleventh Circuit as supplemental authority under Rule 28(j), of the Federal Rules of Appellate Procedure, under cover of a letter dated April 20, 1992, in support of the still outstanding petition for rehearing en banc.

[10]Post **Stinson II** the United States Sentencing Commission has submitted to Congress among its 1991 amendments to the Guidelines its previously published change in the commentary at issue here, United States Sentencing Commission, 57 Fed. Reg. 20148, May 11, 1992.

sentenced under the Career Offender guidelines, although if one assumes that possession of a firearm by a felon is a crime of violence, then by definition most armed career criminals would also be career offenders.[11] Guideline 4B1.4 was expressly created for armed career criminals, effective November 1, 1990, establishing their offense level as level thirty-four (or, in some instances thirty-three) unless either the career offender guideline or Chapter 2 guideline applicable to the conviction, is higher. Under the **Stinson** court's rationale, however, the Armed Career Criminal Guideline would never be applied, because under **Stinson**, all armed career criminals would also be career offenders (even if their only instant offense of conviction were for possession of a firearm), and would invariably score higher as career offenders (level thirty-seven, Category VI based on §4B1.1's offense level for offenses punishable by life; an armed career criminal is punishable by fifteen years to life) than as armed career criminals under Guideline 4B1.4 (level thirty-four or thirty-three, possibly Category IV).[12]

In other words, the Eleventh Circuit's holding in **Stinson** renders Guideline 4B1.4 nugatory. Hence, the Eleventh

[11]Most, but not all, because the Armed Career Criminal Act ("ACCA") counts juvenile convictions, while the Career Offender guidelines do not, and the Career Offender provisions exclude convictions after a term of years, whereas the ACCA has no time limits on the use of prior convictions.

[12]Technically, the §4B1.4 armed career criminal guideline would apply still to the exceptional cases noted in footnote 10 above.

Circuit's rationale for its holding - that it was only overriding commentary, and a circuit court is not bound by commentary, as opposed to Congressionally mandated guidelines - does not withstand scrutiny.

Nor is it only the impact on Guideline 4B1.4 at issue in **Stinson I and II**. When the Sentencing Commission responded to the series of pre-1991 amendment circuit opinions that possession of a firearm either categorically (**O'Neal** and **Stinson I**), or on the facts of the case, was a crime of violence, by adding clarifying commentary to the contrary, it also amended (with Congressional approval) pre-existing Guideline §2K2.1 (Unlawful Receipt, Possession or Transportation of Firearms) to increase the range from twelve to twenty-four (and twenty-six in cases involving firearms listed in 26 U.S.C. §5845(a)) for felons in possession who had two prior crimes of violence or controlled substance offenses. But under the **Stinson I and II** rationales, new Guideline §2K2.1(a)(1) and (2) would never be applied, because in the Eleventh Circuit such defendants would always be career offenders and always subject to an enhanced punishment under §4B1.1.

Thus, the Eleventh Circuit in **Stinson** has, implicit in its holding, determined that Sentencing Guidelines §§2K2.1(a)(1), 2K2.1(a)(2) and 4B1.4 will never be applied.[13]

[13]Except in the narrow circumstances noted above as to §4B1.4 only.

CONCLUSION

Based (1) on the substantial conflict in the Circuits,in which the Eleventh Circuit now stands alone among nine circuits which have considered the issue, in holding that possession of a firearm by a felon is inherently a crime of violence, (2) on the Eleventh Circuit's total disregard of the United States Sentencing Commission's commentary, expressly prohibiting the inclusion of possession of a firearm by a felon as a crime of violence for Career Offender purposes, and (3) on the effect of the Eleventh Circuit's position in **Stinson** on Guidelines §§ 2K2.1(a)(1), 2K2.1(a)(2) and 4B1.4, that is, that they will not be applied in the Eleventh Circuit, Petitioner, Terry Lynn Stinson, respectfully prays this Honorable Court grant his Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

A. The published decision of the Eleventh Circuit Court of Appeals, issued October 4, 1991, reported at 943 F.2d 1268.

B. The published decision of the Eleventh Circuit Court of appeals issued March 20, 1992, reported at 957 F.2d 813.

most extraordinary circumstances. *See In re Ewing*, 54 B.R. at 955. Simple neglect will not justify nunc pro tunc approval of a debtor's application for the employment of a professional. *In re Arkansas Co.*, 798 F.2d 645, 649–50 (3d Cir.1986). This appeal does not present any extraordinary circumstances. The bankruptcy court, therefore, did not abuse its discretion in denying appellants' application for nunc pro tunc approval of debtors' employment of their attorney.

On appeal, the Bank requests this court impose an award of costs and attorney's fees against appellants pursuant to 10th Cir.R. 39 and 46.5. As the prevailing party, the Bank is entitled to an award of costs. Fed.R.App.P. 39(a).

Tenth Circuit Rule 46.5 provides for an award of expenses incurred, including reasonable attorney's fees, against an attorney who signs a brief which is not "well grounded in fact" or which is not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Debtors' attorney received notice of the Bank's request for an award of fees, as it was included in the Bank's appellate brief, and the attorney had an opportunity to respond. *See Braley v. Campbell*, 832 F.2d 1504, 1514–15 (10th Cir.1987). Because appellants' argument on appeal is frivolous, we grant the Bank's request for an award of attorney's fees and the reasonable expenses incurred by the Bank in this appeal, to be imposed against debtors' attorney.

The order of the United States District Court for the District of Colorado is AFFIRMED. The cause is REMANDED to the district court for a determination of the amount of attorney's fees and costs the Bank incurred on appeal.

UNITED STATES of America, Plaintiff–Appellee,

v.

Terry Lynn STINSON, Defendant–Appellant.

No. 90–3711.

United States Court of Appeals, Eleventh Circuit.

Oct. 4, 1991.

Defendant pled guilty to five counts including bank robbery and possession of firearm by convicted felon and was sentenced under career offender provisions of guidelines by the United States District Court for the Middle District of Florida, No. 90–6 Cr-J-14, Susan H. Black, Chief Judge. Defendant appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) possession of firearm by felon was "crime of violence," and (2) application of amended Sentencing Guidelines did not violate constitutional protection against ex post facto laws.

Affirmed.

1. Criminal Law ⇐1202.2

Amended career offender provisions of Sentencing Guidelines and application notes applied when defendant was sentenced after their effective date. U.S.S.G. § 4B1.2, 18 U.S.C.A.App.; 18 U.S.C.A. § 3553(a)(5).

2. Criminal Law ⇐1202.2

Under career offender provisions of amended sentencing guideline and application note, sentencing court need not consider facts underlying particular offense to determine whether offense involves predicate "crime of violence"; offense is "crime of violence" if the offense by its nature presents serious risk of violence, whether or not violence actually materialized in specific conduct with which defendant is charged. U.S.S.G. §§ 4B1.2(1)(ii), 4B1.2, comment. (n.2), 18 U.S.C.A.App.

See publication Words and Phrases for other judicial constructions and definitions.

3. Criminal Law ⇐1202.2

Possession of firearm by convicted felon always constitutes "crime of violence," whether or not injury results during defendant's possession of firearm and, thus, convicted felon found guilty of firearms possession may be subjected to sentence enhancement under career offender provisions of Sentencing Guidelines. U.S.S.G. § 4B1.2, 18 U.S.C.A.App.

4. Criminal Law ⇐1202.2

Felony defendant's conviction for possession of firearm qualified as "crime of violence," for purposes of imposition of enhanced sentence under "career offender" provisions of Sentencing Guidelines. U.S.S.G. § 4B1.2, 18 U.S.C.A.App.; 18 U.S.C.A. §§ 922(g), 924(e).

5. Constitutional Law ⇐203
Criminal Law ⇐1202.2

Imposing enhanced offense level sentence for possession of firearm, based on career offender provisions of Sentencing Guidelines which were amended after his offense but before sentencing, did not violate constitutional protection against ex post facto laws where defendant's sentence was not enhanced as result of application of newer guidelines and application notes. U.S.S.G. §§ 4B1.2, 4B1.2, comment. (nn.1–4), 18 U.S.C.A.App.

William M. Kent, Asst. Federal Public Defender, Jacksonville, Fla., for defendant-appellant.

Ronald T. Henry, Asst. U.S. Atty., Jacksonville, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before JOHNSON and EDMONDSON, Circuit Judges, and DYER, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

In this case, we decide whether a conviction for possession of a firearm by a felon qualifies as a "crime of violence" for purposes of enhancing a defendant's sentence under the "career offender" provisions of the Sentencing Guidelines. We conclude that illegal weapons possession by a convicted felon is inherently a "crime of violence" as defined by the Guidelines, and we affirm the sentence imposed by the district court.

I.

On October 31, 1989, defendant Terry Lynn Stinson robbed a bank in Florida. A few days later, defendant was arrested. At the time of his arrest, defendant was in possession of three inert hand grenades, ammunition, a number of components for the construction of bombs, a razor knife, and a sawed-off shotgun.

Defendant pled guilty to a five-count indictment charging him with bank robbery, in violation of 18 U.S.C. § 2113(a), (d), possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g) & 924(a)(2), (e),[1] use of a firearm during, and in relation to, a crime of violence, in violation of 18 U.S.C. § 924(c), weapons registration violation, in violation of 26 U.S.C. §§ 5861(d) & 5871, and transportation of stolen property through interstate commerce, in violation of 18 U.S.C. § 2312. Defendant had been earlier convicted of three violent felonies. In July 1990, defendant was sentenced under the career offender guidelines to 365 months imprisonment, consecutive to the mandatory minimum five-year imprisonment for use of a firearm during commission of a crime of violence.

II.

A. Career Offender Guidelines

1.

[1] This case is controlled by the career offender provisions, sections 4B1.1 and

1. Section 922(g) states in pertinent part:
(g) It shall be unlawful for any person—
(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year ... to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.
18 U.S.C. § 922(g).

4B1.2, of the Guidelines.[2] Under section 4B1.1, a defendant is a career offender if:

> (1) the defendant was at least eighteen years old at the time of the offense,
>
> (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and
>
> (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1. Defendant argues that the district court's use of his possession of a firearm by a convicted felon conviction as the predicate "crime of violence" offense for career offender purposes under U.S.S.G. § 4B1.1, was improper. Defendant argues that possession of a firearm by a convicted felon is not a "crime of violence."

Section 4B1.2 defines the term "crime of violence," borrowing language from 18 U.S.C. § 924(e) of the Armed Career Criminal Act:

> (1) The term "crime of violence" means any offense under federal or state law punishable by imprisonment for a term exceeding one year that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of injury to another.*

U.S.S.G. § 4B1.2 (1989) (emphasis added).

In the application notes to section 4B1.2, the Sentencing Commission has listed a number of crimes fitting this definition and has noted that other offenses are included where

> (A) that offense has an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (B) *the conduct set forth in the count of which the defendant was convicted* involved use of explosives or, *by its nature, presented a serious potential risk of physical injury to another.*

U.S.S.G. § 4B1.2, comment. (n. 2) (emphasis added).

The defendant's weapons possession conviction is not among those specifically listed in section 4B1.2 or its application notes, and does not have as a statutory element "the use, attempted use, or threatened use of physical force" as provided in section 4B1.2(1)(i) and application note 2(A). We therefore consider whether the weapons possession conviction satisfies the requirements of section 4B1.2(1)(ii) and application note 2(B).

2.

Defendant argues that we cannot look beyond the generic definition of the offense to determine whether weapons possession by a felon is a "crime of violence" under section 4B1.2(1)(ii) and application note 2(B). In support, defendant cites *United States v. Gonzalez-Lopez*, 911 F.2d 542, 547 (11th Cir.1990), in which we held that the term "crime of violence," as used in an *earlier* version of the career offender guidelines, "contemplate[d] a generic category of offenses which typically present the risk of injury to a person or property irrespective of whether the risk develops or harm actually occurs."

[2] Such a categorical analysis certainly is allowed under the amended guidelines and application notes. Section 4B1.2(1)(ii), as amended, provides that an offense constitutes a "crime of violence" where it "involves conduct that presents a serious potential risk of physical injury to another." Application note 2, as amended, clarifies that an offense qualifies if "*by its nature*" that offense involves "a serious potential risk of physical injury to another." Under the amended guideline and application note, then, a sentencing court need not consider the facts underlying a particular offense, assuming such an inquiry is permissible, if the offense "by its nature" presents a serious risk of violence—the offense is a "crime of violence" whether or not the violence actually materialized in the specific conduct with which defendant is charged. Because we conclude that a categorical analysis is at least *permissible* under the amended guidelines, and because (as discussed *infra*) we think illegal firearm possession by a convicted felon "by its nature" imposes "a serious potential risk of physical injury," we need not decide today whether *Gonzalez-Lopez* should be applied to the guidelines and application notes as amended to *require* only a categorical analysis.[3]

2. Section 4B1.2 and its application notes were amended effective November 1, 1989. Because defendant was sentenced after that date, the amended guidelines and application notes apply. *See* 18 U.S.C. § 3553(a)(5) (sentencing courts are to apply the guidelines and policy statements "that are in effect on the date the defendant is sentenced"). We address further the applicability of the amended guidelines *infra* at sections II(A)(2) & (C).

B. Possession of a Firearm by a Felon as a "Crime of Violence"

[3] We must next consider, then, whether possession of a firearm by a convicted felon constitutes a "crime of violence" because the offense "by its nature

3. We note, however, that the holding in *Gonzalez-Lopez* is distinguishable on a number of grounds:

First, the amended version of § 4B1.2 applicable here takes its definition of the term "crime of violence" from a different source—18 U.S.C. § 924(e)—than the earlier version.

Second, the holding in *Gonzalez-Lopez* was influenced by the practical difficulties and potential unfairness to the defendant of allowing the sentencing court to determine, in an ad hoc mini-trial, the actual facts underlying prior convictions. *See Gonzalez-Lopez*, 911 F.2d at 547-48. Here, because the offense at issue is the offense of conviction, not a prior conviction, the district court would look only to conduct relevant to the instant proceedings, much like the sentencing court normally does in the course of sentencing a defendant pursuant to the Guidelines. *See* U.S.S.G. § 1B1.3(a)(1) (sentencing court may consider all conduct that occurred during the commission of the offense of conviction for which the defendant would be otherwise accountable).

Finally, the amended application note accompanying § 4B1.2 contains language that seems expressly to authorize sentencing courts to find crimes of violence even where the offense does not "by its nature" impose a serious risk of physical injury. *See* U.S.S.G. § 4B1.2, comment. (n. 2) (courts may look to "conduct set forth in the count of which the defendant was convicted" in deciding whether offense "presented a serious potential risk of physical injury to another") U.S.S.G. § 4B1.2, comment. (n. 2).

For these same reasons, the courts that have interpreted § 4B1.2 and its application notes—as amended—have allowed sentencing courts in some circumstances to look beyond the generic, categorical definition of an offense to the particular facts "set forth in the count of which the defendant was convicted." *See United States v. John*, 936 F.2d 764 (3d Cir.1991); *United States v. Cornelius*, 931 F.2d 490, 492-93 (8th Cir.1991); *United States v. Walker*, 930 F.2d 789, 793-94 (10th Cir.1991); *United States v. Tidswell*, 767 F.Supp. 11 (E.D.Me.1991); *United States v. Coble*, 756 F.Supp. 470, 474 (E.D.Wash.1991); *United States v. Hernandez*, 753 F.Supp. 1191, 1196 (S.D.N.Y.1990).

The Ninth Circuit has already concluded that, under the earlier version of section 4B1.2 and its application notes, "the offense of being a felon in possession of a firearm by its nature poses a substantial risk that physical force will be used against person or property." *United States v. O'Neal*, 910 F.2d 663, 667 (9th Cir.1990). In support the *O'Neal* court looked to the legislative history underlying 18 U.S.C. § 922(g),[4] including a statement by the original sponsor of that legislation to the effect that felons "may not be trusted to possess a firearm without becoming a threat to society." *Id.* (quoting 114 Cong. Rec. 14,773 (1968) (statement of Sen. Long)).

In a similar way, another court decided that, in the context of a pretrial detention hearing, illegal firearm possession by a felon always amounts to a "crime of violence," as defined by the Bail Reform Act.[5]

4. In *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), the Supreme Court similarly relied on legislative history to clarify what burglary-related offenses Congress intended to be included as "crimes of violence" when it specifically listed "burglary" as a violent crime for purposes of enhancing sentences pursuant to 18 U.S.C. § 924(e). *See id.* at ——, 110 S.Ct. at 2149-54.

5. The Bail Reform Act defines "crime of violence" in part as follows:

> . . . any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property

United States v. Jones, 651 F.Supp. 1309 (E.D.Mich.1987). The court in *Jones* offered four independent justifications for its conclusion that the offense of weapons possession by a felon "by its nature" involves a "substantial risk of physical force": (1) felons are more likely to use firearms in an irresponsible manner; (2) felons are acutely aware that such activity is illegal, making the act of weapons possession a knowing disregard for legal obligations imposed upon them; (3) felons are more likely to commit crimes, enhancing the likelihood the weapon will be used in a violent manner; and (4) illegal weapons possession is an ongoing offense that often is not ended voluntarily, but only through law enforcement intervention, thus "[t]he character of the crime cannot be measured solely as of the moment of discovery and arrest." *Jones*, 651 F.Supp. at 1310. *See also United States v. Phillips*, 732 F.Supp. 255, 262-63 (D.Mass.1990); *United States v. Johnson*, 704 F.Supp. 1398 (E.D.Mich.1988).

We find further support for the conclusion that the offense of weapons possession by a felon "by its nature" imposes a "serious potential risk of injury" in the legislative history behind 18 U.S.C. § 924(e), which streamlined the categories of persons unqualified to receive or possess firearms and established a stiff mandatory minimum punishment.[6] Section 924(e) was included as part of the Federal Firearms Owners Protection Act of 1986, which relaxed federal rules regarding private sales of firearms among sportsmen and collectors while simultaneously "enhanc[ing] the ability of law enforcement to fight *violent crime* and narcotics trafficking." H.R.Rep. No. 495, 99th Cong., 2d Sess. 1 (1986), U.S.Code Cong. & Admin.News 1986, 1327 (report from House Committee on the Judiciary) (emphasis added). Introducing the measure on the floor of the Senate, its sponsor Senator McClure outlined what he considered unduly aggressive federal enforcement of private weapons sales among collectors and sportsmen, and concluded, "We need to redirect law enforcement efforts away from what amounts to paperwork errors and *toward willful firearms law violations that will lead to violent crime; for example*, selling stolen guns, or *selling firearms to prohibited persons.*" 131 Cong.Rec. S9102 (daily ed. July 9, 1985) (statement of Sen. McClure) (emphasis added); *see also id.* at 9113 (statement of Sen. Laxalt) ("[This act] seeks to direct law enforcement efforts toward those firearms transactions most likely to contribute to *violent crime.*") (emphasis added); 131 Cong.Rec. S8700 (daily ed. June 24, 1985) (statement of Sen. Matsunaga) ("Handguns insofar as I am concerned, ... are intended for use for one purpose only; that is to kill other human beings. Whatever controls we can impose upon the sale and distribution of those weapons of death, I say let us go to it. I am relieved by the language of S.49 to the extent that it prohibits firearm and ammunition possession, receipt, or transportation in commerce by convicted felons....").

[4] Like the legislative body that criminalized weapons possession by convicted felons, we conclude that defendant's offense of conviction "by its nature" imposed a "serious risk of physical injury," whether or not injury results at the exact moment of arrest or anytime during defendant's ongoing possession of the firearm.[7] Because this offense always constitutes a "crime of violence," a convicted felon found guilty of firearms possession is automatically subject to sentence enhancement under the career offender provisions of the Sentencing Guidelines. A sentencing court need not look to the "conduct set forth in the count from which the defendant was convicted," if such an inquiry is permissible,[8] to determine whether a "crime of violence" has been committed.

of another may be used in the course of committing the offense.
18 U.S.C. § 3156(a)(4).

6. Defendant's indictment count for weapons possession alleged violations of both 18 U.S.C. § 922(g) and 18 U.S.C. § 924(e).

7. In reaching this result, we are unconstrained by dicta in the recent panel opinion in *United States v. Briggman*, 931 F.2d 705 (11th Cir.1991) (non-argument calendar). In *Briggman*, a panel of this court upheld an upward departure from the Guidelines in a case involving a conviction for weapons possession by a felon. By way of explaining the district court's decision to apply the Armed Career Criminal Act instead of the career offender guidelines for purposes of sentence enhancement, the panel said, "[T]he career offender provisions do not apply in this case because [the defendant's] crime was not one of violence." *Id.* at 710. The words of an opinion are not, in themselves, the holding of the case; the decision and the facts define a case's precedential authority. In *Briggman*, the defendant was sentenced pursuant to the Armed Career Criminal Act, not the career offender provisions of the Sentencing Guidelines. Because the excerpted statement—when read in context—was unnecessary to the outcome and was merely an explanation for an action by the district court that was unchallenged on appeal, we are not bound by the language cited from *Briggman*.

8. *See supra* section II(A)(2).

9. The panel opinion in *United States v. Simmons*, 924 F.2d 187 (11th Cir.1991), is not to the contrary. In that case, the panel acknowledged the passage of a new guideline that would have covered the offense charged, but the panel did not apply the guideline, ostensibly because "only those guidelines in effect at the time appellant committed the offense are applicable in sentencing appellant." *Id.* at 189 n. 1 (citing *United States v. Bradley*, 905 F.2d 359, 360 (11th Cir.1990)). The offense in *Simmons* was committed in November 1988, and according to the briefs in that case, the defendant was sentenced in September 1989. But, the new guideline at issue did not take effect until November 1990, more than a year *after sentencing*. As a result, *Simmons* is consistent with the general rule that sentencing courts are to apply the guidelines and policy statements in effect at the time of *sentencing*. The case relied upon by the *Simmons* panel supports this conclusion. In *United States v. Bradley*, the panel held that amendments to the guidelines taking effect *after sentencing* were inapplicable. *See Bradley*, 905 F.2d at 360.

C. *Ex Post Facto Application*

[5] Defendant contends that application of section 4B1.2, as amended *after* his offense but *before* sentencing, violates the constitutional protection against ex post facto laws. As noted *supra*, we are bound as a general matter by the specific instruction from Congress to consider the Sentencing Commission's guidelines and policy statements "that are in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(5); *see also United States v. Russell*, 917 F.2d 512, 514 n. 2 (11th Cir. 1990), *cert. denied*, — U.S. —, 111 S.Ct. 1427, 113 L.Ed.2d 479 (1991); *United States v. Marin*, 916 F.2d 1536, 1538 & n. 2 (11th Cir.1990) (per curiam); *United States v. Gonzalez-Lopez*, 911 F.2d 542, 546 n. 3 (11th Cir.1990).[9] This circuit has made an exception, however, where the effect of applying an amended guideline "would be to subject a defendant to an increased sentence," thereby implicating the Constitution's prohibition on laws having ex post facto consequences. *United States v. Worthy*, 915 F.2d 1514, 1516 n. 7 (11th Cir.1990) (citing *Miller v. Florida*, 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987)).

Defendant argues that under the *Gonzalez-Lopez* precedent, discussed *supra*, we would have been limited to a "categorical analysis" of the offense of conviction to determine whether it constitutes a "crime of violence" for career offender purposes. *See Gonzalez-Lopez*, 911 F.2d at 547 (offense is considered "crime of violence" if it "typically present[s] the risk of injury to a person or property irrespective of whether the risk develops or harm actually occurs"). But, our conclusion that illegal firearm possession by a felon "'by its nature' impose[s] a 'serious risk of physical injury,' whether or not that risk materialized at the exact moment of arrest, or anytime during defendant's ongoing possession of the firearm" also satisfies the *Gonzalez-Lopez* standard. Defendant's sentence was not enhanced as a result of our application of the newer guidelines and application notes; the Ex Post Facto Clause is not implicated.

III.

Because defendant's instant conviction for weapons possession by a felon is a "crime of violence," as defined in section 4B1.2 and its application notes, the district court properly enhanced defendant's sentence under the career offender provisions of the Sentencing Guidelines. We AFFIRM.

when a corporate officer absconds with them for "personal reasons."

VI. CONCLUSION

Our review of the record in this case, as well as the briefs submitted by the parties, persuades us that the district court properly held that the purely corporate documents in Paul's custody must be produced, regardless of the reasons for which Paul acquired them, and regardless of Paul's subsequent termination from the bank. Accordingly, for the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

UNITED STATES of America, Plaintiff-Appellee,

v.

Terry Lynn STINSON, Defendant-Appellant.

No. 90-3711.

United States Court of Appeals, Eleventh Circuit.

March 20, 1992.

Defendant was convicted in the United States District Court for the Middle District of Florida, No. 90-6-Cr-J-14, Susan H. Black, Chief Judge, of various offenses, including bank robbery and possession of a firearm by a convicted felon, and was sentenced under career offender provisions of the Sentencing Guidelines. Defendant appealed. The Court of Appeals, 943 F.2d 1268, affirmed, and defendant petitioned for rehearing. The Court of Appeals held that Sentencing Commission's amendment to Sentencing Guidelines' commentary, stating that offense of possession of a firearm by a convicted felon does not constitute a "crime of violence" for career offender purposes, was not binding on Court of Appeals until Congress amended language of Guidelines to exclude specifically possession of firearm by a felon as a "crime of violence."

Rehearing denied.

1. **Criminal Law** ⇐1202.2, 1202.3

Sentencing Commission's amendment to Sentencing Guidelines' commentary, stating that offense of possession of a firearm by a convicted felon does not constitute a "crime of violence" for career offender purposes, was not binding on Court of Appeals until Congress amended language of Guidelines to exclude specifically possession of firearm by a felon as a "crime of violence." U.S.S.G. §§ 4B1.2, 4B1.2, comment., 18 U.S.C.A.App.

2. **Statutes** ⇐217.4

Generally, courts only turn to legislative history when statute is ambiguous on its face.

3. **Criminal Law** ⇐1239

Although Sentencing Guidelines commentary should generally be regarded as persuasive, it is not binding. 28 U.S.C.A. § 994(p); U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.App.

William M. Kent, Asst. Federal Public Defender, Jacksonville, Fla., for defendant-appellant.

Ronald T. Henry, Asst. U.S. Atty., Jacksonville, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

ON PETITION FOR REHEARING

Before EDMONDSON, Circuit Judge, DYER and JOHNSON *, Senior Circuit Judges.

Appeals for the Eleventh Circuit.

* *See* Rule 34-2(b), Rules of the U.S. Court of

PER CURIAM:

[1] This case is before us on a petition for rehearing. Appellant, Terry Lynn Stinson, argues that the Sentencing Commission's recent amendment to the commentary to U.S.S.G. § 4B1.2, which states that the offense of possession of a firearm by a convicted felon does not constitute a "crime of violence" for career offender purposes, is retroactive and applicable to appellant's sentence.

We earlier determined that the law that was in effect when appellant was sentenced was that possession of a firearm by a convicted felon was categorically a "crime of violence." *United States v. Stinson*, 943 F.2d 1268 (11th Cir.1991). We were not alone in this interpretation of Guidelines § 4B1.2. At least four other circuits have held that, for sentencing purposes, firearms possession by a convicted felon either is a crime of violence or, at least, could in some circumstances be considered a crime of violence. *See United States v. O'Neal*, 937 F.2d 1369 (9th Cir. 1990) (holding that offense of possession of firearm by felon is "crime of violence" within the meaning of Guidelines § 4B1.2); *see also United States v. Alvarez*, 914 F.2d 915 (7th Cir.1990) (applying a "facts of the case" analysis for whether or not possession of firearm by felon is crime of violence); *United States v. Goodman*, 914 F.2d 696 (5th Cir.1990) (same); *United States v. Williams*, 892 F.2d 296 (3d Cir. 1989) (same). Before the Commission amended the commentary, no circuit court had concluded that section 4B1.2's term "crime of violence" excluded the offense of unlawful possession of a firearm by a felon.[1]

The Commission's alteration consisted of the following sentence, which was added to section 4B1.2's commentary: "The term 'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." United States Sentencing Comm'n, Guidelines Manual, Ch. 4, Pt. B, comment., n. 2 (Nov. 1, 1991). The substance of the Commission's change in the commentary runs directly counter to the substantial volume of precedent interpreting section 4B1.2.

The Commission's amendment did not alter the actual text of section 4B1.2; instead, it merely changed the commentary. The text of section 4B1.2 was exactly the same in October 1989, when appellant committed his offense, as it is now. When we are faced with the question of whether we should reverse our decision and also ignore precedent from other circuits because of a change in guideline commentary, it is crucial to examine closely the appropriate weight to be afforded to the commentary.

The Sentencing Reform Act of 1984, which authorized the guideline system, tells the courts to consider pertinent policy statements issued by the Sentencing Commission that are in effect on the date the defendant is sentenced. 18 U.S.C. § 3553(a)(5). The Guidelines themselves contain a section which specifically addresses the question of what weight is to be given the commentary; U.S.S.G. § 1B1.7 states that "commentary is to be treated as the equivalent of a policy statement." The commentary to section 1B1.7 in turn states that "the courts will treat the commentary much like legislative history or other legal material that helps determine the intent of a drafter." U.S.S.G. § 1B1.7, comment.

[2] In general, courts only turn to legislative history when a statute is ambiguous on its face. *See Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984). In this case, because section 4B1.2's term "crime of violence" was less than clear, we looked to the commentary to clarify the meaning of "crime of violence." But, when we originally interpreted this section, the commentary was silent about whether possession of a firearm by a felon was to be included as a "crime of violence." This new commentary coming after we had

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A brief review of the
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1. Since the amendment, two circuits have relied, in part, on the amendment to the commentary to conclude that a crime of violence does not include "possession of a firearm by a felon." *See United States v. Fitzhugh*, 954 F.2d 253 (5th Cir. Jan. 28, 1992); *United States v. Johnson*, 953 F.2d 110 (4th Cir.1991).

2. *See* 28 U.S.C. § 994(p). commentary does not go tensive review process as selves, for if they did shar there would no basis for the guidelines and the co would be no reason for th or to have the different w line commentary, itself, s

3. In upholding the constitu lines in the face of a co based on excessive delegati er grounds, the Supreme *United States*, 488 U.S. 36 102 L.Ed.2d 714 (1989), s mission is fully accountab

construed the guidelines, raises the question of what effect should be given a post hoc change in the commentary—or newly created "legislative history"—by the Sentencing Commission.

A brief review of the Sentencing Guidelines enactment procedures seems appropriate. After the Sentencing Commission's initial guidelines were submitted to Congress, and after the prescribed period of congressional review, the guidelines took effect on November 1, 1987. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p). Yet, the commentary is never officially passed upon by Congress. According to the enabling statute, Congress is only charged with reviewing the amendments to the guidelines.[2] If there is no change to a particular guideline, but the Commission alters that section's commentary, there is no evidence that Congress reviews it or is even notified of the alteration.[3]

[3] Therefore, we must be mindful of the limited authority of the commentary. We doubt the Commission's amendment to section 4B1.2's commentary can nullify the precedent of the circuit courts. As far as we can tell, at no point has this change been called to Congress's attention, much less, been authorized by Congress. Although commentary should generally be regarded as persuasive, it is not binding. *See United States v. Elmendorf*, 945 F.2d 989 (7th Cir.1991); *United States v. Pinto*, 875 F.2d 143, 144 (7th Cir.1989). We decline to be bound by the change in section 4B1.2's commentary until Congress amends section 4B1.2's language to exclude specifically the possession of a firearm by a felon as a "crime of violence." [4]

Therefore, we stand by our original interpretation of section 4B1.2: that possession of a firearm by a felon inherently constitutes a "crime of violence." Accordingly, appellant's sentence is affirmed and the motion for rehearing is DENIED.

C & W LEASING, INC., Plaintiff–Counter–Defendant–Appellant,

v.

ORIX CREDIT ALLIANCE, INC., Defendant–Counterclaim Appellee.

No. 89–4012.

United States Court of Appeals, Eleventh Circuit.

April 1, 1992.

After prepaying loan, borrower brought action against lender that included claims of fraud, conversion, and nonjury

2. *See* 28 U.S.C. § 994(p). We assume that the commentary does not go through the same intensive review process as the guidelines themselves, for if they did share the same procedure, there would no basis for a distinction between the guidelines and the commentary; and there would be no reason for them to exist separately or to have the different weight which the guideline commentary, itself, says exists.

3. In upholding the constitutionality of the guidelines in the face of a constitutional challenge based on excessive delegation of legislative power grounds, the Supreme Court in *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 666, 102 L.Ed.2d 714 (1989), stated that "the Commission is fully accountable to Congress, which can revoke or amend any or all of the Guidelines ..." We note, however, that there is no mention that Congress has the power to amend directly the guidelines' commentary which we see as uniquely the Commission's work product.

4. Of course, it would be equally satisfactory if the Commission changed the text of the guidelines to exclude firearm possession and submitted the altered text for congressional review during the prescribed period. *See* 28 U.S.C. § 994(p). This practice would ensure that Congress passes upon the amendment and that there is no improper delegation of legislative power. *See Mistretta*, 488 U.S. at 394–395, 109 S.Ct. at 666.